No. 5633 In Admiralty

United States Circuit Court of Appeals

For The Ninth Circuit

TATSUUMA KISEN KABUSHIKI KAISHA,
a corporation of the Empire of Japan,
Appellant,

—VS.—

ROBERT DOLLAR COMPANY,
a corporation, *Appellee.*

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT FOR THE DISTRICT OF OREGON
HON. JOHN H. MCNARY, *Judge*

BRIEF OF APPELLEE

JOHN AMBLER,
Proctor for Appellee.
1519 Railroad Avenue South,
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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant's opening brief has stated at length the issues involved in this case. Although appellant has raised a jurisdictional question, we hardly believe that it is being seriously pressed. The case really hinges on the correct interpretation to be placed on paragraph 8 of the bill of lading upon which the lumber involved in this proceeding was shipped.

At the risk of perhaps some repetition, we would like to briefly summarize the facts of the case as follows:

Certain lumber was delivered to the S.S. "Hakutat-

su Maru" then lying at Vancouver, British Columbia, for transportation to the port of Hongkong, China. The lumber was duly put on board, freight prepaid, and a bill of lading was issued under date of May 27, 1925.

On June 29, 1925, the vessel en route to Hongkong arrived at the port of Kobe, Japan. Upon arrival at said port, she was advised of the somewhat chaotic conditions existing in China as a result of the recent student uprisings. Thereupon, according to appellant's answer, the master and agent of the vessel decided it would be "unsafe and impractical" for the vessel to call at the port of Hongkong, and after holding the cargo on board while vessel drydocked for annual survey, the vessel discharged the cargo and stored the same at Kobe. Later the lumber was reloaded on another vessel, and was finally delivered at destination on September 13, 1925.

Before final delivery to appellee at destination, appellant, relying on Clause 8 of the bill of lading, demanded some $1500 Gold, representing alleged discharging, lighterage, storage, and reloading charges at Kobe. Appellee finally paid this amount under written protest, as it was in desperate need of the lumber and could obtain same in no other way. The clause relied on is as follows:

> "8. If the vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same, or from discharging any or all of said

merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged, then first: all merchandise not discharged may be retained on board vessel and returned to her port of original shipment or same may be at option of ship's master or agent and at owners cost and risk be conveyed upon such or any vessel to any other port and thence to said port of delivery; or second, same may be forwarded to and landed and delivered or stored at any other port at Owner's cost and risk and Carrier shall have a lien on said merchandise for all expense so incurred, provided, however, that if said merchandise or any thereof be so returned to such port of original shipment no additional freight shall be charged, and that delivery or storage of such merchandise at any such other port or on such return to such port of original shipment shall be a final and sufficient delivery. In case any part of the merchandise cannot be found for delivery during vessel's stay at port of discharge, same may be forwarded at Carrier's expense, but no liability shall exist for any loss or damage resulting from delay."

Appellee contends that the above clause under the admitted facts of this case, does not grant the liberty taken by the vessel in discharging her cargo short of destination and forwarding the same in the method described.

ARGUMENT

POINT I.

JURISDICTION

Respondent has first raised a question as to the jurisdiction of this court, based upon the ground that the cause of action in this case is not maritime in nature. Respondent bases its contention in particular upon the case of *The T. W. Lake,* decided by this Honorable Court in 1927, and reported in 16 F. (2) 372. In that case a libel *in personam* was filed by an insurance company against the owner of the "T. W. Lake", alleging that the insured vessel, with the privity of the assured, was sent to sea in an unseaworthy condition, that because of that condition she sank and became a total loss, that the insurance company had paid out certain sums without the knowledge or means of knowing that the vessel had been sent to sea in an unseaworthy condition, and in ignorance, misinformation and mistake of the true facts in the case. The libel prayed for the return of the money, stating that the owner of the vessel held such money for the libellant's use as and for money had and received. This court dismissed the libel for lack of jurisdiction.

Respondent has quoted from the decision of this court in *The T. W. Lake* case, but left out, we believe, some helpful language, and we particularly call the court's attention to the following quotation from the decision:

"Courts of admiralty cannot entertain an

original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud, *Andrews v. Essex Fire & Marine Ins. Co.*, Fed. Cas. No. 374. In *United Transp. & L. Co. v. New York & Baltimore T. Line*, 185 Fed. 386, it was held that admiralty has no jurisdiction over non-maritime transactions following the execution of maritime contracts. This was held in reference to a counterclaim for damages on account of excessive charges paid to the libellant by the respondent under a prior contract between them, which contract was alleged to be void and fraudulent for the reason that respondent's general manager, who made it, was also an officer of the libellant and betrayed the trust imposed in him by the respondent. Said the court, 'The matter is not maritime. The *fundamental question is whether the manager of the respondent corporation, induced by his interest in the libellant corporation, betrayed his trust, and this question is not maritime in its nature.*'

"The appellant admits that its causes of action are in the nature of assumpsit for money had and received, and contends that while it is true that the libellant alleges that the appellee made incorrect proofs of loss and that the payments were made under 'misapprehension, misinformation, mistake, and ignorance of the facts,' those allegations are not the basis of the causes of action but are inserted to show admiralty jurisdiction in that the question of the *right to recover involves the construction of maritime contracts*

and the application of principles of maritime law, and it relies upon *Kittegaun; U. S. Shipping Board v. Banque Russo Asiatique,* 1923 A.M.C. 387, 286 Fed. 918; *John Francis,* 184 Fed. 746; *Allanwilde v. Vacuum Oil Co.,* 248 U. S. 377; and *Int. Paper Co. v. Gracie D. Chambers,* 248 U. S. 387. In the first two cases so cited the libels were brought to recover money exacted under duress and paid under protest. *The parties to those actions were in the same attitude to the litigation that they would have been in had the action been brought directly upon the contracts, and the only question before the court was the proper construction of contracts of affreightment and the determination of the rights of the parties thereunder.* The same substantially is true of *The Allanwilde* and the *Gracie Chambers* case. The question of jurisdiction was not raised or discussed in those cases and decision there turned wholly upon the meaning of the provisions of charter parties. *Those cases differ from the case at bar.* Here the action is not merely an action on a maritime contract or tort, nor a suit to enforce liability under the covenants of policies of marine insurance. It is an action growing out of certain alleged inequitable acts of the appellee, and primarily its purpose is to recover money obtained by means of fraud and false representations." (Italics ours)

It will be noticed from the quotation that this court recognized that admiralty jurisdiction extended to suits to recover money paid under protest, if the

gist of the action was "the proper construction of contracts of affreightment and the determination of the rights of the parties thereunder." The court correctly distinguished the facts in regard to *The T. W. Lake* case, as the purpose of that action was "to recover money obtained by means of fraud and false representations". The distinction in the two lines of cases was clearly drawn by this court, and is quite obvious.

The same distinction applies to the case of *United Transport & Lighterage Co. v. New York, etc.*, 185 Fed. 836, quoted and discussed in *The T. W. Lake* case.

Appellant here invokes one other case in support of its contention that the court is without jurisdiction. This is the case of *Boera Bros. v. United States*, 1924 A. M. C. 1474. In this case the court used the following language: "The libellants are not seeking to enforce a maritime contract, nor to obtain an accounting as incident to a maritime contract * * *". There, again, the case was not based on any interpretation of a maritime contract, nor was any effort being made to enforce such a contract.

An examination of the cases upon which libellant in the *T. W. Lake* case relied shows that they are directly in point with the case at bar.

In the case of *The Kitteguan*, 286 Fed. 918, the facts were as follows: The Kitteguan arrived at her port of destination with certain cargo on board. The consignees of the cargo were unknown. The cargo was kept on board for several days and finally discharged into open lighters. The ship's agent refused to deliver the goods until the consignee made payment

for freight and demurrage. This was paid under protest, and consignee filed its libel for recovery. On the question of admiralty jurisdiction, the court said:

> "Nor do we agree with appellant's contention that the claim is not within the admiralty jurisdiction. *A decision of the matters in dispute between the parties necessitates a construction and review of the terms of bill of lading, a distinctly maritime contract.* From time immemorial the construction of such contracts and the determination of issues arising out of them, has been part of the duty of the courts of admiralty." (Italics ours)

In the case of *The John Francis*, 184 Fed. 746, also referred to in *The T. W. Lake* case, the consignee did not take delivery of goods within the lay days provided by the charter, and they were discharged. Ship's agent would only deliver upon payment of freight and certain charges accruing subsequent to discharge. This money was paid under protest, and a libel *in rem* was filed to recover the amount paid. The court recognized that, although it was really an action for money had and received, it was a proper basis for a libel *in rem*, as it involved the construction of the agreement between the parties. We would call the language of this case particularly to the court's attention.

The case at bar falls directly within the rule laid down in *The Lake Eckhart*, 1924 A. M. C. 498. There libellant was a charterer of respondent's steamer and undertook to supply a full cargo of sugar. The vessel went to the quay, but did not load the full quantity.

The master informed the shipper that the remaining cargo would have to be loaded outside of the bar on account of the vessel's draft. Weather conditions prevented this. The master demanded dead freight, and threatened to place a lien upon the cargo at destination if dead freight were not immediately paid. Libellant paid the amount under protest and sued to recover. Under the terms of the charter, act of God, fire, "and every other unavoidable hindrances * * * always mutually excepted." The court said:

> "Respondent concedes that if it were seeking to collect for dead freight, the action would be within the admiralty jurisdiction. It is contended, however, that libellant is merely endeavoring to enforce an implied promise to repay money improperly exacted, and as the agreement does not in terms provide for such repayment, there is no relief to be had in this branch of the court."

It will be noticed that this is just the point set up by counsel in this case. The court goes on:

> "In my opinion, a ship owner is not to be permitted, after the partial execution of a valid charter party, and after a shipper is placed in a position in which, as a practical matter, it is impossible to do otherwise than submit to an improper exaction of money, to deny that the admiralty is without jurisdiction to pass upon the rights of the parties.
>
> "Such doctrine, even if it exists under any circumstances, cannot here be adopted, and for this reason: If libellant, as a matter of fact and

> of law, was not bound to pay for dead freight, the refusal and failure of the master of the *Lake Eckhart* to carry and deliver the loaded cargo according to the terms stipulated in the charter party, constituted a breach of a maritime contract of which this Court has jurisdiction. The money improperly exacted represents the damages sustained by libellant through respondent's failure to carry out its agreement."

See also,

G. A. Tomlinson, 279 Fed. 786.

We respectfully submit that the admiralty jurisdiction in cases such as that under discussion, as shown by the foregoing cases, is well established; and we further respectfully submit that this Honorable Court in their decision in the case of *The T. W. Lake* expressly recognized the jurisdiction of admiralty in cases such as the one at bar.

Appellant raises the question as to whether an action *in rem* lies against the S. S. "HAKUTATSU MARU" by reason of the fact that the actual delivery in this case at Hongkong was made by another vessel. We respectfully submit that the contract in this particular case was between appellee and the "HAKUTATSU MARU"; that said vessel is setting up as a defense for its breach of contract a clause of their contract. The fact that said vessel employed some other vessel to make final delivery does not excuse her responsibility for breach of the contract. The S. S. "HAKUTATSU MARU", respondent in this proceeding, contracted to deliver lumber, under certain conditions, at Hongkong. She failed to do so, and appellee

is seeking in this proceeding to hold her responsible for failure to comply with her contract. The other vessel participating plays no part, save perhaps that of an agent.

POINT II.

Interpretation of Clause 8

The vessel here agreed to transport certain lumber from Vancouver, British Columbia, Canada, to Hongkong, China, for a certain consideration. It failed to do so.

There are two possible means of escape for the carried: (1) an implied condition in an absolute contract that the contract will end if the venture is *frustrated* by impossibility of performance; and (2) where performance is excused under the terms of the bill of lading itself. This is well stated in the case of *The Poznan*, 276 Fed. 418, where Judge Learned Hand, one of the ablest of admiralty judges, uses the following language:

> "Everyone agrees that an undertaking to deliver as evidenced by the bill of lading was absolute except in so far as it was excused, and there are only two excuses offered: first, that the venture was frustrated by impossibility of performance; second, that performance was excused under the terms of the bills of lading themselves."

See also,

Hellig Olaf, 282 Fed. 534.

Under exactly which of the above two exceptions to

the carrier's responsibility appellant contends that the instant case falls, it is hard to say.

Discussion of Appellant's Authorities

In the first case cited in appellant's brief, *The Yaquina,* 13 F. (2) 394, the facts were as follows: The vessel arrived at the port of Piraeus, Greece, and was boarded by men in uniform who ordered the vessel not to discharge the cargo, most of which was consigned to the Greek army at that port, but to proceed to Salonica. They also delivered a document purporting to be under the seal of the Minister of War, ordering him to proceed to the latter port. The harbor was under martial law, and all lighters had been requisitioned by the army. The bill of lading provided that if, on account of any cause beyond the control of the steamer, it was impossible or unsafe, "in the opinion of the master", to unload goods at the port of discharge, the same could be carried to the next convenient port for transshipment, or retained on board for delivery on return.

The master testified as to what had occurred in Piraeus, and as to what led him to believe it was impossible to discharge at that port. The court found he acted in good faith, and held that the parties to the bill of lading, if they agree to abide by the master's opinion as to whether or not it is safe to discharge cargo at the point of destination, they may not question the advisability of his judgment if exercised in good faith.

It will be noticed that the vessel actually arrived at the port of discharge, and upon its arrival found

conditions which the court held showed the master's action was taken in good faith. If, in the instant case, the vessel had actually proceeded to the port of discharge, and the master in good faith had exercised his judgment upon examination of the entire situation, the appellee could not complain. It is appellee's complaint, however, that under the terms of the agreement appellant must actually proceed to the port of discharge before exercising his judgment as to whether or not it is safe to discharge at that point. Short of destination, his judgment is valueless. In the cited case he did so; hence the case is not in point.

Appellant's next case, the *West Cawthon*, 281 Fed. 894, is also not in point. In this case libelant sought to recover damages for non-delivery of rice shipped by the named vessel from the Orient to Havana. When the vessel reached Cienfuegos, Cuba, a very nearby port, she discovered that the congestion in the port of Havana was so great that it would be impossible to deliver her cargo there for months. The master consequently discharged the rice at that port. The basis of the decision is found in the following paragraph:

> "The claimant relies upon various provision of its bill of lading which it contends grants freedom in the master's discretion to discharge at another port than that of agreed destination. *It is unnecessary to consider whether this contention is or is not well founded, for the evidence abundantly shows that the delivery at Cienfuegos, instead of Havana, caused no legal damage to*

the libelant, as the rice could have been sold for as much or more at Cienfuegos as it would have brought at Havana." (Italics ours)

The judge's remarks in this case with regard to the good judgment exercised by the master, as shown by the above quotation, has absolutely no connection with the facts of the instant case, as the exercise of the master's judgment in the instant case, as will be shown below in more detail, is based upon a specific liberty granted by the contract, where, in the *West Cawthon* case, the court said there was no use considering the contract as the libelant hadr eceived no legal damage, and in the instant case appellee has admittedly received damage.

The third case cited by appellant, the *Kronprinzessin Cecilie*, 244 U. S. 12, is an extremely interesting case. It is one of the outstanding cases in the United States on the subject of "*frustration*". In this case the above vessel started for England just before war was declared. Three days later she received notice from her owners to return to New York. The following day the German Imperial Marine Office wirelessed that war was threatened and to touch at no British, French or Russian port. When the master received the word from his owners that war had been declared, and to return, he had just enough coal to either complete his voyage or return to New York. He returned to the United States. The court held that his action in so doing, under all the circumstances, was justified. In the opinion Justice Holmes uses the following language:

"With regard to the principles upon which the

obligations of the vessel are to be determined, it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was 'arrest and restraint of princes, rulers, or peoples', other exceptions necessarily are to be implied unless the phrase restraint of princes be stretched beyond its literal intent."

The court held the case was not one of "arrest and restraint", limiting that to more immediate apprehension of danger. From this language, and from the entire opinion, it is clear that the rule in the *Kronprinzessin* case is based upon the doctrine of "frustration". Many cases involving this principle arose during the war, particularly with vessels under long time charters where the charterer was paid a much higher rate by the government on account of war conditions when the vessel was requisitioned, whereas the owner received merely the original charter hire. The questions involved in this doctrine were bitterly fought out, in several cases going to the British House of Lords, and the whole basis of this doctrine was thoroughly threshed out.

The doctrine is based upon an implied condition in the contract that the parties did not promise to perform an impossibility. It is based upon the failure of something which was, at the basis of the contract, in the mind and intention of the contracting parties. The doctrine is *absolutely inapplicable* to the case under discussion, as there is a settled exception to this doctrine. This exception is thus stated in MacClachlan's Law of Merchant Shipping, p. 474:

> "The rule (of frustration) rests on the presumed intention of the parties. *Where the contract makes full and complete provision usually intended for a common contingency the principle does not apply thereto.*"

In Williston on Contracts, sec. 1937, this authority says, speaking of this doctrine:

> "Of course, if the contract makes provision for a contingency which occurs, the provision is applied; but in cases properly involving the defense of impossibility, the words of the promise are absolute."

In *Bank Line v. Capel* (1919) A. C. 435, Lord Sumner, in the British House of Lords, uses the following language:

> "The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties. 'Where a contract makes full provision' (that is, full and complete provision, so intended) 'for a given contingency, it is not for the court to impart into the contract some other and different provisions for the same contingency called by a different name'."

So, again, in *Tamplin v. Anglo-Mexican Petroleum Co.* (1916) A. C. 397, another case decided in the British House of Lords, the court, speaking of the doctrine, says:

> "Where a contract makes full and complete provision for a common contingency, the principle does not apply."

The following is an extremely clear pronouncement of this exception to the doctrine of frustration:

> "It was argued that the contract was frustrated; but the doctrine of frustration applied only when an implication of law must of necessity be introduced into the contract, and it never applied where there was a clause in the contract actually providing for the precise state of affairs which was relied on as producing frustration."
>
> *Banch v. Bromly*, 37 L. T. R. 71.

This is merely a common sense proposition. If the parties enter into an agreement in which they recognize the possibility of a certain contingency, and make full provisions for each party's rights in the event of such a contingency, it is manifestly not just for a court to wipe out the contract of the parties and make an entirely new one for them. *In the case at bar the contract specifically states what liberties are granted in case of strikes, riots, etc. The court cannot add to or deduct from this contract. It can only construe what is in the contract. The doctrine of frustration is manifestly inapplicable.*

The last case cited by claimant, *Nobel's Explosives Co. Ltd. v. Jenkins & Co.*, is also reported in (1896) 2 Q. B. 326. In this case a vessel carrying explosives to Yokohama, Japan, entered the port of Hongkong, and in accordance with local regulations raised a red flag denoting she had explosives on board. The same day war was declared between China and Japan. In addition to shore batteries, several vessels of the Chinese navy were cruising outside of the port of Hongkong. The flag publicly announced she had

war materials on board. The bill of lading provided for "restraint of princes and rulers," and also contained a further clause as follows:

> "In case of a blockade or interdict of the port of discharge, or if the entering of or discharging in the port of discharge shall be considered by the master unsafe by reason of war or disturbance, the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods."

The master discharged his cargo of explosives at Hongkong and continued on his way. The court justified his action on the ground of this constituting a restraint of princes and rulers, stating that the presence of the battleships right outside the harbor constituted just as serious a restraint as if they were actually holding the vessel. The court went on to state that the quoted clause of the bill of lading might also afford a further answer to the claim. The libelant in that case contended that the vessel had to proceed to Yokohama before she would be entitled to claim the benefits of this clause, and the court held that such was not the case.

The *Nobels Explosives* case and the instant case can be distinguished upon two very distinct grounds: first, the clause relied upon in that case permits the liberty to be taken advantage of "in case of a blockade or interdict of the port of discharge." Such a blockade actually existed, and would go into effect as soon as the vessel left the port of Hongkong. A condition of war existed. The vessel carried contraband consigned to a belligerent whose opponent's battle

cruisers were waiting for it right outside the harbor. No more effective blockade can be conceived regarding this vessel.

The chief distinction, however, is in the actual wording of the clauses. The wording of the clause in the *Nobels Explosives* case is very broad; no limit is put upon the master's exercise of judgment. The clause does not say that the vessel must be prevented from entering the port of delivery "on arrival at or near the same". It does not say that the master must think it impracticable to there land the cargo "while the ship be at said port". It does not say that all merchandise "not discharged may be *retained* on board vessel". It merely says that if entering or discharging is considered unsafe, the master may land the goods at the nearest safe and convenient port. Although this is the closest case cited by claimant, the facts are so utterly different and the wording of the clause so utterly unlike, that it is of no value.

As stated in the foregoing, the entire problem in this case thus resolves itself into the question—

Is Performance Excused by Clause 8 of the Bill of Lading?

Paragraph 8 of the bill of lading falls naturally, grammatically, and by punctuation into three situations. The liberties later granted are predicated upon the existence of one of these three situations. This clause of the bill of lading may be paraphrased as follows:

If vessel be prevented by riot or strike or other cause

(a) from entering said port of delivery on her arrival at or near the same;

(b) from discharging any or all of said merchandise;

(c) while the ship be at said port, if in judgment of ship's master or agent it be considered impracticable to there discharge any or all of said merchandise, or for same to be there safely landed if discharged; then

1—A. *all merchandise not discharged* may be retained on board vessel and returned to her port of original shipment; or

B. *same* may be conveyed upon such or any other vessel to any other port and thence to port of delivery; or

2—*said merchandise* may be forwarded to, and landed, and delivered, or stored, at any other port at owner's cost and risk, and carrier shall have a lien for expenses so incurred.

The three clauses are distinctly set off by commas, and contemplate three distinct situations. In appellant's brief it attempts to rewrite this paragraph. It has combined (a) and (b), thus subdividing these three divisions into two divisions. The purpose of this rewriting is apparently to make the words "at or near" modify, if possible, each situation. From that appellant argues that a vessel need only be "at or near" a port for the master to exercise his judgment, and that Kobe, 1376 miles from Hongkong, is "at or near" Hongkong.

Examining paragraph 18, it will be seen that, after

the enumerated causes for prevention, the clause continues:

> "or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same (comma) or from discharging any or all of said merchandise (comma) or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged (comma) then first: * * *"

From this wording and punctuation, it is absolutely impossible, without rewriting this clause, to make the words "at or near" modify any clause other than that in which it is contained, *i. e.*, this phrase modifies the entering of the port of delivery and that situation alone.

From the above it is clear that this clause anticipates the vessel proceeding to the port of delivery. She is granted certain liberties if, upon her arrival *at or near* the port of delivery she is *prevented* by certain causes from entering, or if she is *prevented* by some cause from discharging after entering the port of delivery. Exactly what constitutes a strict *prevention*, is somewhat difficult to ascertain. Consequently, the next liberty is somewhat broader. *While the ship is at the port of delivery*, if, in the judgment of the ship's master or agent, it becomes "impracticable to there discharge", the vessel is then granted the same liberties as if she were actually *prevented*. A vessel must be actually near or in a port to be *pre-*

vented from entering or discharging. (See cases cited and quoted below.)

As a safeguard upon the exercise of the judgment of the master, the same requisite is put into the clause which allows the vessel liberties where the master believes it impracticable to discharge, without actually being *prevented.* This safeguard is that, as a condition precedent to the exercise of the master's judgment, the vessel must be present at the port of discharge, where the master is in actual touch with existing conditions and, having the whole picture before him, can use his best judgment.

THE ENTIRE CLAUSE BEARS OUT THIS CONSTRUCTION

"* * * it be impracticable to *there* discharge * * * while the ship be at said port." This is foolish reiteration, unless "while the ship be at said port" refers to the time when judgment must be exercised.

PREVENTION

Appellant on page 22 of its brief makes some argument that the vessel was *prevented* from entering Hongkong and discharging. As suggested above, "prevention" means a definite check or restraint. It has a definite restricted meaning in bills of lading.

In the case of *Schilizzi v. Derry*, 4 El. & Bl. 872; 119 Eng. Rep. 324, a vessel was chartered to proceed to a certain port, or so near thereunto as she might safely get, and to there load cargo for a United Kingdom port. The charter party contained the usual exceptions of act of God, perils of the seas, etc. The vessel arrived November 5th within some miles of

the port, when it was found that the river by which it would be forced to proceed was barbound. On December 11th she sailed to another port and took cargo from other parties. It would have been unsafe for her to remain at the mouth of the river after December 11th, and the port to which she went was the nearest port. On January 7th there was water enough for the vessel to have proceeded to her port of loading. It was held that the vessel was not prevented from accomplishing the purpose of the charter party, and the vessel was forced to respond in damages. The opinion says:

> "Here is a positive contract to proceed to a port unless prevented by dangers and accidents of the seas, etc. That must mean prevented from doing so at all: it would be most dangerous to hold that a temporary obstruction puts an end to the obligation."

The reason for putting in the bill of lading the third liberty granted by Clause 3, is the difficulty shipowners might have in establishing *prevention*, as the rule is very strict.

In *Comptoir Comm. Anversois v. Power, Son & Co.* (1920) 1 K. B. 868, the facts were as follows: Certain contracts were made during June and July contemplating sale of wheat to be transported from New York to certain European ports. The contracts provided that in the event of war, if sellers had not received from buyers insurance policies, they would have the right to cover the goods themselves. At the time of shipment insurance was impossible to effect, and without insurance the bills of lading could not

be negotiated. The contracts were broken, and the buyers sued the sellers, who defended on the ground that the shipments were prevented by a clause of the contract as follows: "In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end." We quote below from the opinion of the lower court on the construction to be placed on the word "prevention". This opinion was affirmed in the upper court:

> "So there was nothing in this case to prevent shipment, except the inability to sell exchange, and the arbitrators, in finding that 'shipment was prevented by hostilities within the meaning of the prohibition clause', must be basing themselves upon this inability. Now, if I give to the word 'shipment' the widest meaning of which it is capable, it cannot mean more than bringing the goods to the shipping port and then loading them on board a ship prepared to carry them to their contractual destination. It is this, or some part of this, which has to be prevented by hostilities, to bring the sellers within the clause. The remaining question is, what does 'prevent' in this connection mean? Now, both upon authority, and as a matter of construction apart from authority, I am of opinion that as used in this clause 'prevention' means either physical or legal prevention. Inability to sell exchange is neither the one nor the other. Moreover, as I have pointed out, inability to sell exchange does not arise in respect to any given cargo until such cargo is

shipped. I think the finding of the arbitrators on this point is wrong."

Banks, L. J. in the opinion of the upper court, referring to the above, said:

"He also held that the prevention referred to in the exception clause referred to a physical or legal prevention. In this also I think he was right."

Later in the opinion the court states that "Economic unprofitableness is not 'prevention'."

In this particular case, to state that a vessel lying at Kobe was prevented from entering the port of Hongkong, or prevented from discharging at that port, is manifestly absurd. The term "prevention" means something far more immediate.

The Third Liberty Granted by Clause 8 Is Manifestly and Necessarily the Basis of Appellant's Defense

As suggested, it is sometimes quite hard for a court or a jury to state what constitutes a *prevention.* Must there be actual physical violence, or can there be constructive prevention? If a constructive prevention, what constitutes a sufficient restraint to become a constructive prevention? The *Kronprinzessin* case, cited by appellant, indicates a strict rule, as there the court held no "arrest or restraint" existed. To avoid such questions arising, the third liberty is granted by the bill of lading. This liberty is as follows: *While ship be at said port,* if in the judgment of the ship's master or agent, it be impracticable to *there* discharge all or any of said merchandise, then "all

merchandise not discharged may be retained on board * * *" but "same may be forwarded to and landed * * *." Appellee's construction gives every word in the quoted phrase a real meaning.

Appellant speaks at some length of the *master's bona fide* exercise of discretion in this case. This is not under discussion at the present time, and is totally irrelevant, as there is a condition precedent provided in the contract between the parties to the master's exercise of discretion, and until this condition precedent has been complied with he cannot exercise his discretion in changing or avoiding the explicit terms of the bill of lading under which the lumber in this case was transported.

By the contract in the present case, the vessel agreed to carry for libelant certain lumber from Vancouver to Hongkong. The vessel has inserted in its contract certain liberties on which it relies upon the happening of certain contingencies. Appellant alleges that a certain contingency has arisen, and seeks to take advantage of the liberty consequently granted. The rights of the parties as above outlined *are solely dependent* upon the wording of clause 8 of the bill of lading. In speaking of a somewhat similar clause in the case of *The Poznan* (*supra*), the court said:

> "It gives the master the broadest discretion to terminate the venture and discharge the ship at that port which most nearly will fill the contract. Obviously such an exception should be scrutinized with care unless the charterer is to be free at pleasure to disregard the whole purpose of the voyage. The ruling that exceptions must be

> strictly construed (citing case) applies with exceptional force."

The clause mentioned in *The Poznan* case provided that in case of war, etc., "whether existing or anticipated", which the master might think would give rise to delay or difficulty in reaching, discharging or leaving at the port of discharge, he was given the liberty to discharge elsewhere. Another clause in the bill of lading in that case provided for liberty in the event of certain contingencies "with or without proceeding to or towards the port of discharge, or entering or attempting to enter or discharge the goods there".

Exceptions in bills of lading are always construed against the shipowner. *The West Aleta*, 1926 A. M. C. 855, decided in the Circuit Court of Appeals of Ninth Circuit, is a good example of the strictness with which particular this Circuit views the liberty clauses in a bill of lading.

See, also, *Compania v. Brauer*, 168 U. S. 104, where the court said:

> "Exceptions in the bill of lading or charter party inserted by the shipowner for his own benefit, are unquestionably to be construed most strongly against him."

Despite this well settled rule, appellant avowedly asks the court to rewrite and repunctuate the clause in *its* favor. Appellee is asking the court only to construe the contract as written and as punctuated; it asks for no ambiguity to be resolved in its favor. There is no ambiguity in the clause under discussion. If there is ambiguity, appellee is entitled by law to

have such ambiguity resolved in its favor. Appellant virtually asks the court to take out of the clause the words "while the vessel be at said port", and then asks the court to violate every rule of grammar and puncuation by holding that the words "at or near", found only in the first situation provided for, and set off by punctuation with the first situation, modify the succeeding situations. Such a request is inconceivable, particularly where it is claimant's own document. If the clause needs rewriting, it should have been rewritten before.

Conclusion

In conclusion we submit that:

1. The jurisdiction of this court is well established.

2. The doctrine of "frustration" injected by the appellant is wholly inapplicable.

3. The S.S. "Hakutatsu Maru", while she was at Hongkong, was never *prevented* from *entering* the port of Hongkong or *discharging* at that port.

4. The master or agent of the vessel, under the terms of the contract of carriage, could exercise his discretion only "while the ship be at said port" of discharge, and not while the vessel lay over a thousand miles away, at Kobe, Japan.

For the foregoing reasons, we respectfully request the court to affirm the decision of the lower court upholding appellee's exceptions to the amended answer of appellant.

Respectfully submitted,

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Seattle, Washington,
February 25, 1929.